Supreme Court, U.S.
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No. 97-492

In The

Supreme Court of the United States

October Term, 1997

JOHN F. VICKERS MASONRY,
AN ARIZONA CORPORATION,

Petitioner,

v.

GUISEPPE FURRER, S.P.A.,
AN ITALIAN CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM M. PIATT*
2700 N. Central Avenue, #1150
Phoenix, Arizona 85004
(602) 264-0114
Counsel for Respondent
Guiseppe Furrer, S.P.A.
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should this Court exercise jurisdiction to review a decision of the Arizona Supreme Court which reversed trial court findings as "clearly erroneous" and legal rulings upon commercial law issues as "error;" where no Constitutional issue regarding the issues has been raised and ruled upon below?

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STATEMENT OF JURISDICTION

Petitioner's Statement of Jurisdiction is disputed. Although jurisdiction is claimed to subsist under 28 U.S.C. § 1257, the case does not represent a request for review of a state supreme court order " . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . . . " This Court has therefore no enacted jurisdictional basis of review.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition raises no Constitutional provisions which have been raised, heard, or ruled upon below.

STATEMENT OF THE CASE

This petition arises from an action filed in Maricopa County Superior Court to collect a balance of $107,993.73 due to the Guiseppi Furrer Co., a leading Italian producer of granite and marble building materials, from the Vickers Company (now Vickers-Hari Contracting) for stone products which had been purchased for, and used in, constructing the Esplanade office complex in Phoenix for its developer, the Symington Company. (Pet. App. C)

The contract for these materials began in October, 1988, in a one-page facsimile message from Emery, a Florida stone broker acting for Vickers, soliciting a bid from Furrer for certain listed and described materials in general size ranges and round sum quantities, all to be

delivered cut and finished according to specific instructions to be transmitted at a subsequent time as the stonework was scheduled and shop drawings prepared. Furrer faxed a bid back to the broker in a gross amount of $461,131.52. An acceptance of the bid was sent back to Furrer by Emery on November 26, 1988. Prior to the start of production, the buyers visited the Furrer plant in Carrara, Italy to schedule the job. No further agreements were negotiated or signed and the original takeoff sent to Furrer in the solicitation (contractor's estimate of the materials needed as determined from the design) was not reviewed or amended. (Pet. App. C)

Consistent with practice in the business, the stone materials were systematically cut and finished from individual drawings of each stone piece prepared by Emery's draftsman and sent to Furrer. Shipments were assembled and dispatched to meet Vicker's building schedule by ocean freight in standard containers and invoiced against 60-day payment by Vickers. Over a 9-month period, some 9 shipments were sent, and invoices for $447,366.06 were transmitted and timely paid. (Pet. App. C. ¶18) No questions were raised as to prices or quantities and it is undisputed that the stone cut, finished, and shipped was exactly in compliance with the drawings and shipment orders placed. (Pet. App. C, ¶¶16-18) No material out of thousands of individual pieces was rejected or returned. From time to time, small issues arose over mis-cut stone pieces, delayed delivery, and similar issues which in the aggregate, never reached a total of $10,000 and which were corrected on-site. Normally, these items could be back-charged or adjusted in the final invoices. The orders were first placed in April, 1989 and completed to Furrer

in November. The last stone was shipped from Italy in February, 1990.

In early 1990, when Furrer was preparing the last few containers, it was learned that the owners of the Esplanade wished to open the facility in March, 1990. The normal mode of delivery would not have permitted timely completion. Air shipment would cost nearly $18,000. But, as an accommodation, Furrer offered to split this cost with Vickers. Mr. Palagi of Furrer wrote to Vickers as follows:

> In order to help you at our best and to close down every pending item with you, we are willing to share at 50% this amount with you. Please, confirm. Dott Mazzi informed to tell you that he enjoyed very much your reception of him in Phoenix and he hopes to reciprocate on your next trip to Italy.
>
> Jim, once again we want to inform you that we have never been notified that the grand opening of the Esplanade was to be on March 1, 1990 and for all the confusion mess happened with drawings and shop tickets which entirely due to the "broker" between the two of us. You can rest assured to have all our cooperation and friendship for future business on which we may work together.

In the reply, a letter from Jim Hari directly to Giovanni Palagi sent that day (1 February), Mr. Hari included the statement:

> Yes, we agree to 50% of air freight costs for container 17.

He then added:

> We wish to express our sincerest gratitude to Dr. Mazzi, yourself and all others who may have helped to clear up any misunderstandings that may have been encountered in the past. We also look forward to being able to work with you in the future.

At that time, not one word had been said about the remaining invoices to come and which were unbilled and unpaid, and none of the previous nine invoices were disputed. All disputes had been limited to credits and charge backs for stone that had to be recut, and a collection of charge back items to the stone finisher in Italy (some of which Furrer had subcontracted). The fundamental unit materials and labor cost as invoiced was never disputed, contested, or even discussed.

After the materials (and their invoices) arrived and the final installation of green marble (verde acceglio) was made on the floors, the owner rejected the installation on the basis that the stone contained excessive quartz veining and was thus nonconforming to the Vickers contract with the general contractor. Vickers was required to tear up $65,000 worth of marble and relay the floor with similar material from other vendors. After the floor was relayed without financial contribution from Furrer, Vickers made no further payments. This action followed.

The course of the litigation as represented by petitioner is subject to clarification. The original action filed was grounded upon a fixed-price contract, Furrer's counsel not being then aware of the changes occurring in administration which are outlined in argument below.

Vickers, who *was* aware of the changes, moved for summary judgment on a basis of "payment and satisfaction" without having previously pled this defense and without disclosing the invoice changes to the contract in discovery. In responding to the motion. Furrer's counsel learned of the changes and moved to amend the complaint, seeking recovery alternatively on open account. Vicker's counsel convinced the trial court that the theory of recover in the original complaint had misled Vickers into preparing the motion. The trial court *granted* Furrers' amendment and *denied* Vickers' motion, and accommodated Vickers' claims of surprise only to the extent of allowing Vickers an allowance against ultimate fees to be awarded Furrer in final judgment. Furrer was not ordered to pay anything. (Pet. App. C. ¶40).[1]

Vickers asserted at trial a counterclaim against Furrer for supplying nonconforming goods (the verde acceglio marble flooring) which was ultimately rejected by the Symington Company and which was the actual cause of Vickers' refusal to pay the remaining $105,000 due on the invoices. The trial court ruled against Vickers on this issue. (Pet. App. C):

> 30. THE COURT FINDS that according to the terms of Defendant/Counterclaimant VICKERS' subcontract, VICKERS was required to have the architect's approval of materials pursuant to

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[1] Counsel for Defendant also attempted to reschedule Furrer's deposition in *Phoenix* in December, 1992, *after* the trial was continued and sought sanctions against counsel when he refused to direct the deponent to spend another $2,000 to travel to Phoenix anyway. (Pet. App. C, ¶41). The sanction ordered is *de minimis*.

samples prior to VICKERS' installation of the materials.

31. THE COURT FINDS because of time constraints under Vickers' subcontract, Vickers installed certain green marble within the confines of the main lobby floor as well as the mezzanine lobby floor without approval of the architect or prior inspection of materials by the general contractor.

32. THE COURT FINDS that all of the marble shipped to Defendant/Counterclaimant VICKERS for use in the main and mezzanine lobby floors and other interiors came from the Plaintiff/Counterdefendant FURRER's quarry in the Italian Alps.

33. THE COURT FINDS that except for twenty (20) pieces of verde acceglio marble valued at about $2,500.00, the remainder of the verde acceglio marble was as bargained for and should not have been rejected by either the general contractor or the owner.

34. THE COURT FINDS that the type of verde acceglio marble demanded by the general contractor and owner in terms of the replacement floor was not justified.

35. THE COURT FINDS that there is little, if any, difference from the verde acceglio marble originally supplied by Plaintiff/Counterclaimant FURRER and as opposed to the later verde acceglio marble obtained from the stock supplies of another independent supplier, which was used for the replacement floors.

This finding was not appealed by Vickers.

Neither party raised, on appeal, any issues based upon Federal or Constitutional law and none are articulated in the decisions. The Arizona Supreme Court *reversed* the trial court upon its findings that the original contract was unmodified and also ruled that the issue of unpaid invoices *was not* comprised within any settlement agreement between the parties, essentially reversing on those contentions which facilitate judgment for the unpaid invoices.

REASONS FOR DENIAL OF THE PETITION

I.

The Decision Below Denied No Procedural Due Process and Properly Corrected Errors of Law and Fact in the Trial Court.

This is not, as argued, a case where standards of appellate review under Arizona State law have been obviated, such that a reviewing court failed to give proper deference to the finder of fact at trial, and the affirmance of the trial findings on review. It is a case where the trial court was ultimately determined to have drawn inappropriate conclusions from undisputed fact, and to have failed to apply undisputed law to stipulated fact. The Arizona Supreme Court simply issued an opinion which removed substantial confusion which had resulted from defense trial strategy.

A. In the joint pretrial statement, both counsel agreed that the certain matters were stipulated, all as carried forward into the trial court findings: (Pet. App. E)

14. THE COURT FINDS that between May 12, 1989, and on or about May, 1990, Plaintiff/Counterdefendant FURRER supplied stone products which Defendant/Counterclaimant VICKERS used to complete all exterior and interior marble and granite work at Phase B of the Esplanade Project. The stone materials used on the Esplanade Project include rosa limbara which is light gray granite with pinkish inclusions produced in Sardinia Island; verde acceglio which is dark green marble with light colored veins or inclusions; and alpenina which is a pinkish colored marble from Spain which has some white veins. The only source in the world for verde acceglio marble is in the western Alps in Italy in a quarry owned by Plaintiff/Counterdefendant FURRER. Alpenina is quarried in Portugal. The parties agreed to substitute rose atlantide which is a pinkish marble with white veins quarried in Portugal for the alpenina materials required on the Esplanada Phase B Project.

15. THE COURT FINDS that Plaintiff/Counterdefendant FURRER to Defendant/Counterclaimant VICKERS were identified by nineteen (19) specific invoices, all as attached to FURRER's prior motion for summary judgment filed in this action.

16. THE COURT FINDS that Plaintiff/Counterdefendant FURRER delivered the materials and provided the labor identified in invoice Nos. 1 through 19.

17. THE COURT FINDS that Defendant/Counterclaimant VICKERS ordered the stone materials and labor set forth in Invoice Nos. 1

through 19 dated May 12, 1989, through February 9, 1990, by means of the purchase order, shop drawings, shop tickets and other communications involving VICKERS, R. E. Emery & Associates, and personnel of Plaintiff/Counterdefendant FURRER.

18. THE COURT FINDS that Defendant/Counterclaimant VICKERS has paid Plaintiff/Counterdefendant FURRER the sum of $447,366.06 in nine (9) separate payments as follows:

DATE	CHECK NO.	AMOUNT
6/26/89	3567	$ 31,738.94
7/26/89	3663	$ 28,998.78
8/20/89	3706	$ 25,237.11
9/27/89	3855	$164,827.32
10/18/89	3927	$ 28,357.76
11/27/89	4060	$ 67,223.02
12/27/89	4144	$ 23,103.42
1/29/90	4221	$ 52,894.44
2/9/90	4262	$ 24,985.27

19. THE COURT FINDS that the payments made by Defendant/Counterclaimant discharges all but $2,000.00 for Invoice No. 2193, and Invoice Nos. 123, 165 and 190 remain unpaid.

20. THE COURT FINDS that none of the goods delivered by Plaintiff/Counterdefendant FURRER to Defendant/Counterclaimant VICKERS have been returned to FURRER.

21. THE COURT FINDS that the goods delivered by Plaintiff/Counterdefendant FURRER to Defendant/Counterclaimant VICKERS have in fact been used, consumed or disposed of according to VICKERS' wishes.

The pretrial statement or order supplants the pleadings under Arizona trial procedure and the case is, and was, governed by these agreed matters, Ariz. R. Civ. Pro. 16(e). The trial court had no basis to refuse them.

The above facts and referenced exhibits establish as a matter of law that the original, fixed-price contract negotiated for $461,131.52 in 1989 was very substantially changed during contract administration. The materials and finishing work actually ordered were cut and shipped upon individual orders, submitted by Vickers over time. (Pet. App. C, ¶17) These were, after each shipment was prepared, converted into invoices prepared by Furrer with the billing derived from the self-same unit prices as had been used in submittal of the original bid. (Pet. App. C, ¶16) Vickers acknowledged in trial that the unit prices, which were employed were the standard industry prices and that there was no expectation that they were excessive or not the prices used in the original bid. Some nine invoices, submitted to Vickers with the shipments, were timely and fully paid by Vickers in an amount of $447,366.06. Then, after the marble floor was rejected, payment stopped.

The remaining four invoices, totalling another $105,046.35 were ignored. The 13 invoices taken together and acknowledged by Court and counsel, show that of the original stone as bid, some $154,202.92 was never ordered. However, some $248,491.05 which was *not* in the bid, *was* ordered *and* supplied per the invoices! The extra material ordered (less the stone not ordered) brought the

total to $555,359.79, an increase of $94,220.23[2] but reflecting a change in customer requirements of 54%! These facts were found by the Arizona Supreme Court to be inconsistent with, and insufficient, to support the legal conclusion at trial that the original contract remained, after administration, only a fixed-price contract for $461,131.52.

The law which applies to merchandise ordered, shipped, accepted and used is universally prescribed under Section 2-607 of the Uniform Commercial Code, A.R.S. § 47-2607. "The buyer must pay at the contract rate for any goods accepted."[3] The provisions of ¶16 serve to mandate application of this law. There is no provision of the trial findings in which the court ever specified what the original, fixed-price contract comprised.

B. There is, similarly, no fact basis for urging, as Vickers told the trial court, that all payment obligations were merged into a settlement agreement to share the cost of air freighting one of the final shipments, all four of which were at that time uncompleted, unshipped, and not yet invoiced. The parties had a pending agenda of disputed chargebacks totalling less that $10,000 and Furrer agreed to pay $8,500 of the air freight, which it was not obliged to do, in settlement. No discussion or difference over the invoices, either received or yet to come, was ever mentioned. The Supreme Court properly observed that Furrer could not have waived $107,000 in

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[2] The total sought in the case is $107,993.73, which includes some ancillary and uncontested costs.

[3] The trial court had allowed that perhaps $2,500 worth of the marble was unconforming to specification but was.

entitlements over less that $10,000 in disputed chargebacks, and certainly not before the last several invoices were even printed. In any event, the claim of "release" or "compromise and settlement" was raised only at trial by Vickers, having been omitted in the answer and in the assertion of a prior motion for summary judgment claiming that the original contract price was paid.

The trial findings again demonstrate inconsistency and confusion on the release issue. The court incipiently finds as follows:

> THE COURT FINDS that Plaintiff/Counterdefendant FURRER and Defendant/Counterclaimant VICKERS agreed that each share one-half of the cost of air shipment of container No. 17, and that such agreement constituted a settlement on the then-known items in dispute.

Then, it goes further to conclude:

> THE COURT FINDS that Plaintiff/Counterdefendant FURRER waived any rights it had to recover $19,893.28 for "extras" [1) Size of stone (a) 4-5 cm rosa limbara = $7,869.94; (b) 2-3 cm verde acceglio = $11,249.53; 2) Brass strips = $299.21; and, 3) floor dots = $474.60.] These extras were acknowledged by Defendant/Counterclaimant VICKERS to be over and above the lump sum fixed price of the purchase order.

The plain truth is that where a settlement agreement is made *prior* to the shipment of over $100,000 in stone wares, and *prior* to their invoice, a settlement agreement cannot embrace these unknown items nor their disproportionate value, and especially where there is absolutely

no mention of the stone and cost overages in the written memoranda of the agreement.

II.

There is no Basis for Review upon Certiorari

The Arizona Supreme Court has decided in this case no question of Constitutional, or of federal law, or even of Arizona state law. The opinion (Pet. App. A) reveals that the Court, accepting jurisdiction and reversing upon a petition for review without additional briefing or argument, acted only in its discretionary and supervisory capacity to correct errors of law and obvious errors of factual discontinuity in the trial court's findings which were not properly traversed in the Court of Appeals. It appears clear that the court below reversed specifically because the trial court findings were, as stated, "clearly erroneous" and plainly reversible under *Board of Regents v. Phoenix Newspapers*, 167 Ariz. 254, 806 P.2d 348 (Ariz. 1991). Vickers has noted that the Court is specifically authorized to reverse "clearly erroneous" findings.

The supervision of trial and appellate court decisions upon state questions of law and fact is vested by Arizona law in the Arizona Supreme Court, Ariz. Const. Art. 6, § 5. There is no Federal authority to authorize or direct this Court to act in aid, or contravention, of the state court's determination of such questions and there is no reason to believe that this Court can make any further contribution to the quality of subordinate state court

function were it to undertake the task of doing so, in this or any similar case.[4]

Vickers contends that the unanimous decision of the Arizona Supreme Court below to revise the trial findings of fact is a denial of due process of law. Unquestionably, whether the Court's conclusion was correct, its task is not *per se* an issue of Constitutional dimension. It has the prerogative of reviewing such findings for error and where error is found, it has the obligation of ruling accordingly. Such an exercise of judicial prerogative, consistent with and within the confines of its jurisdiction, is not a denial of Vicker's rights in and to a decision consistent with due process. It is a necessary act in the protection of Furrer's entitlement to procedural due process! There is no claim that the Supreme court below acted in a manner which deprived its decision of the integrity of everyday judicial administration, *i.e.*, that it is not a properly constituted decision, or that it was arrived upon in some improper fashion. Absent some showing to such effect, Vicker's claims say nothing other than that the Court below decided the case against defendant.

Without the sequestration of a Federal question in the petition as called for under Rule 14(1)(g)(i), of this Court's rules, showing its timely assertion below, and the manner of its disposition, there is no basis upon which this Court can ground its jurisdiction for review and no record on which to assess the possibility that the Arizona

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[4] Unlike this Court's task relative to the inferior Federal courts.

court acted as claimed, and much less that it acted incorrectly.

Although unprovided, there is likewise nothing in Vickers' Motion for Reconsideration filed after the decision appealed from here to show that the Constitutional issue raised here was first raised below so as to establish the issue for purposes of jurisdiction under 28 U.S.C. § 1257. There is literally nothing in the petition or its appendices as presented to establish that the Arizona court did not act properly. And yet, Rule 14 specifically invites the appending of any necessary portions of the record to so demonstrate. If procedural due process was denied below, the petition and appendix here does not demonstrate, upon any ground, that denial.

CONCLUSION

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM M. PIATT, P.C.

WILLIAM M. PIATT
Attorney for Plaintiff